

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: November 8, 2011

TO: Mayor and City Council

FROM: City Attorney

SUBJECT: Applicability of the First Amendment to the Special Event Summer Moratorium, the Exemptions thereto, and the process Waiver

INTRODUCTION

On October 11, 2011, the San Diego City Council introduced Ordinance No. O-2012-24 (Ordinance), which amends the San Diego Municipal Code relating to the issuance of permits for the use of parks and beaches. At that meeting, the American Civil Liberties Union (ACLU) presented concerns that the Summer Moratorium and waiver process violated the First Amendment.¹ The City Council requested that the Office of the City Attorney respond to those concerns. The ACLU subsequently submitted another letter with additional details of their concerns.

QUESTION PRESENTED

Does the Special Event Summer Moratorium, the exemptions thereto, or the waiver process violate the First Amendment?

SHORT ANSWER

No. Special Event permits are not generally required for Expressive Activity protected by the First Amendment; the Summer Moratorium, the exemptions, and the waiver are inapplicable to activities that are exempt from the Special Event permit requirements.

¹ Both the United States Constitution and the California Constitution protect the right of free speech, and in fact the California Constitution is more protective of that right. However, for ease of reference, the right is referred to throughout this memorandum as the "First Amendment."

ANALYSIS

I. BACKGROUND

On October 11, 2011, the City Council introduced the Ordinance, which amended Chapter 6, Article 3, Division 1, relating to the issuance of permits for the use of parks and beaches. One of the amendments proposed by the Ordinance is the codification of the Summer Moratorium. As drafted, the Ordinance states that no reservations of space for Special Events will be granted by the City Manager for the use of a park or beach for a Special Event during the Summer Moratorium, which is defined as the Saturday prior to Memorial Day and the preceding Saturday and Sunday through Labor Day. The Ordinance lists certain events that are exempt from the Summer Moratorium, and also includes a waiver process for any applicant who desires to hold their Special Event during the Summer Moratorium.

At the City Council hearing, an ACLU representative spoke regarding the item and presented a letter expressing concerns with the Summer Moratorium, specifically that the Ordinance would expressly favor some speakers over others. In addition, that letter states that the proposed waiver provision does not solve this problem because waivers would be issued apparently at the City's sole discretion. On October 21, 2011, subsequent to the City Council hearing, the ACLU submitted an additional letter which stated that the Summer Moratorium is unconstitutionally based on the content of speech, is not narrowly tailored to serve a significant interest, and does not leave open ample alternatives for Special Events in the summer.

II. THE FIRST AMENDMENT AND CALIFORNIA CONSTITUTION PROHIBIT THE ABRIDGEMENT OF FREE SPEECH

The First Amendment to the United States Constitution states that Congress "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I. These provisions are made applicable to actions of the states through the Fourteenth Amendment to the United States Constitution. U.S. Const. Amend. XIV, §1.² The California Constitution also protects the right of every person to "freely speak," and provides that no law may "restrain or abridge liberty of speech or press." Cal. Const. art. 1, § 2. The California constitutional provisions are more protective of the rights to free speech than the United States Constitution; therefore state law prevails, although the California courts will rely on both state and federal law. *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1025-26 (C. D. Cal. 2002).

² Although the Fourteenth Amendment prohibits certain actions by any "State," municipal ordinances adopted under state authority are state actions for the purposes of free speech. *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450 (1938).

III. THE SUMMER MORATORIUM, THE EXCEPTIONS THERETO, AND THE WAIVER PROCESS DO NOT ABRIDGE FREE SPEECH

A. The First Amendment Protects Against “Prior Restraints” of the Exercise of First Amendment Rights

A prior restraint is basically any “scheme which gives public officials the power to deny use of a forum in advance of its actual expression.” Black’s Law Dictionary 1194 (6th Ed. 1990). A licensing requirement may be a prior restraint, if that license is a means to prohibit or censor the speech. 13 Cal. Jur. 3d *Constitutional Law* § 246 (2011). Nevertheless, the government may impose permitting requirements in order to accommodate the competing uses of public spaces. *Mardi Gras of San Luis Obispo*, 189 F. Supp. 2d at 1027-28. Even if the licensing requirement is a prior restraint, the restrictions may still be valid if the following four tests can be met: (1) they are justified without reference to the content of the regulated speech; (2) they are narrowly tailored to serve a significant governmental interest; (3) they leave open ample alternative channels for communication of the information; and (4) the permitting scheme does not delegate overly broad licensing discretion to a government official. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1023-24 (9th Cir. 2009).³

B. The Summer Moratorium, the Exceptions thereto, and the Process Waiver Are Not Applicable to Expressive Activity

This issue of a prior restraint is only relevant, however, if the activity involved is actually the exercise of First Amendment rights. The October 21 ACLU letter states that “Special Events remain fully protected by the First Amendment.” While some Special Events may be First Amendment protected speech, some may not. Therefore, it is more accurate to state that First Amendment protected speech remains fully protected by the First Amendment. For example, there is no authority for an absolute statement of law that hydroplane races, a type of Special Event, are protected First Amendment speech.

Unless otherwise provided, a Special Event permit is required for any person to conduct, promote, manage, aid, or solicit attendance at a Special Event. SDMC § 22.4004. Special Events are defined in the San Diego Municipal Code as:

³ The First Amendment restrictions on the state’s ability to limit speech are also dependent in part on the type of location, or forum where the speech is to occur. When the speech occurs in a public forum, which are those places traditionally associated with the exercise of the First Amendment, a content-based regulation is subject to strict scrutiny. 13 Cal. Jur. 3d *Constitutional Law* § 265 (2011). This means that it may only be enforced if it is necessary to serve a compelling state interest, and is narrowly drawn to achieve that interest. *Id.* Places such as streets, sidewalks, and parks are public forums. *Id.* Content based laws are those that “by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed . . .” *Mardi Gras of San Luis Obispo*, 189 F. Supp. 2d at 1029 (citation omitted). This is not always an easy task, but the principal inquiry is whether the regulation was adopted because of an opinion about the message conveyed. *Krontz v. City of San Diego*, 136 Cal. App. 4th 1126, 1136 (2006). There is no indication that the City has exempted events from the Summer Moratorium based on the message the events convey, if any. This memorandum will focus on the issue of prior restraint, as that seems to be the specific issue raised by the ACLU.

- (a) any organized formation, parade, procession or assembly consisting of seventy-five (75) or more Persons, and which may include animals, vehicles or any combination thereof, which is to assemble or travel in unison on any Street which does not comply with normal or usual traffic regulations or controls; or,
- (b) any organized assemblage of seventy-five (75) or more Persons at any public beach or public park which is to gather for a common purpose under the direction and control of a Person; or,
- (c) any other organized activity conducted by a Person for a common or collective use, purpose or benefit which involves the use of, or has an impact on, other public property or facilities and the provision of City public safety services in response thereto.

SDMC § 22.4003.

Some examples of Special Events are “concerts, parades, circuses, fairs, festivals, block parties, community events, mass participation sports (such as, marathons and running Events, bicycle races or tours, “over-the-line” tournaments), or spectator sports (such as, football, basketball and baseball games, golf tournaments or hydroplane or boat races).” SDMC § 22.4003(d).

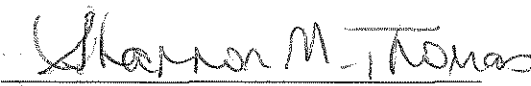
There are certain exceptions to the requirement to obtain a Special Event permit and Expressive Activity is excluded in those exceptions. Relevant exceptions to the Special Event permitting requirement include (1) lawful picketing on sidewalks and (2) demonstrations that do not involve the use of vehicles, animals, pyrotechnics or equipment other than sound equipment, so long as no fee or donation is charged or required as a condition of participation or attendance, and the Chief of Police is notified at least 36 hours in advance of the demonstration. SDMC § 22.4005(c). A demonstration is defined as “any formation, procession or assembly of seventy-five (75) or more persons which, for the purpose of Expressive Activity, is: (a) to assemble or travel in unison on any Street in a manner that does not comply with normal or usual traffic regulations or controls; or (b) to gather at a public park or other public area.” SDMC § 22.4003. Expressive Activity as defined includes “conduct, the sole or principal object of which is the expression, dissemination or communication by verbal, visual, literary or auditory means of opinion, views or ideas and for which no fee or donation is charged or required as a condition of participation in or attendance at such activity. It includes public oratory and distribution of literature.” *Id.* The City’s Special Event Ordinance recognizes and protects the First Amendment rights of its citizens “to engage in protected free speech expression activities and yet allow for the least restrictive and reasonable, time, place, and manner regulations of those activities . . .” SDMC § 22.4002.

Therefore, while usually a Special Event permit is required for the organized assembly of 75 or more persons to either travel on the street in a manner that does not comply with traffic regulations, or to gather on a public park or beach, no Special Event permit is generally required for Expressive Activity. The Summer Moratorium on the issuance of Special Event permits, the exceptions thereto, and the waiver processes are inapplicable to activities that are themselves exempt from the Special Event permit requirements.⁴

CONCLUSION

The Ordinance implements the City's Summer Moratorium on Special Events, created to increase the general public's access to the beaches and Developed Regional Parks, but exempts the long-standing events. The Ordinance also creates a waiver process for those applicants who nevertheless would like to pursue having a Special Event during the Summer Moratorium. The Ordinance is content neutral, and does not apply to those activities that are already exempt from the requirement to obtain a Special Event permit, which by and large, are Expressive Activities.

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MS-2011-16

⁴ It is anticipated that amendments to the City's Special Event Ordinance will be presented to the City Council sometime in 2012 for revisions regarding the permitting process. As is customary, the Office of the City Attorney will review that Ordinance for any other required changes, whether they be housekeeping matters or amendments necessitated by changes in the law, including the First Amendment.